Supreme Court, U.S.
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No. 86-264

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

*Petitioners,*

vs.

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY FINISHERS INC.,

*Respondents.*

## BRIEF IN OPPOSITION TO CERTIORARI

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In the Supreme Court of the
United States
October Term, 1986

NO. 86-264

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

against

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NASTASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY FINISHERS INC.,

Respondents.

## Brief In Opposition

Respondents, Nastasi-White, Inc. ("Nastasi") and Circle Industries Corp. ("Circle") respectfully request this Court to deny the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on April 14, 1986 affirming the judgment of the United States District Court for the Eastern District of New York dismissing the complaint as against these respondents. The opinion of the United States Court of Appeals and the United States District Court for the Eastern District of New York are annexed to the petition at Appendix pages 1a through 9a and 14b respectively.

## Questions Presented

1. May less than a majority of the trustees of an employee benefit plan sue to recover fringe benefit contributions allegedly owed by employers when the agreement and declaration of trust establishing the fund requires that the decision whether to sue, in the absence of a majority vote by the trustees, be submitted to arbitration; and there has been no request for arbitration of the deadlock?

2. Does a participant in an employee benefit plan have standing to sue an employer for the alleged failure to contribute to the plan, when the trustees of the plan have not determined by a majority vote to bring such an action, no demand for arbitration of the deadlock has been made, and no fiduciary breach has been committed by the trustees?

3. May a participant in an employee benefit plan sue an employer under Section 502 of ERISA for alleged unpaid contributions when no wages upon which such contributions must be based were earned by members of the union who participate in the funds, the work was performed by members of another union, contributions based upon wages paid were made by the employer to the funds of that union, and there has been no determination that the work was not properly assigned?

## STATEMENT OF THE CASE

### Nature of the Case

This action represents the latest of several attempts by plaintiffs to pursue resolution of an ongoing jurisdictional dispute between two unions under the guise of an ERISA suit. The two unions are The Operative Plasterers and Cement Masons International Association, Local 530 ("Local 530"), and the Drywall Tapers and Pointers of Greater New York, Local 1974 ("Local 1974"). Although these disputes were apparently put to rest by the 1978 Hearings Panel Decision and the judicial determination in Drywall Tapers and Pointers of Greater New York, Local 1974 v. Operative Plasters' & Cement Masons' International Association, 601 F.2d 675 (2d Cir. 1979) cert. denied 444 U.S. 1073 (1980), the dispute continues to fester and this action was thus brought clothed in the garb of ERISA litigation.

## The Course of the Proceedings and the Disposition in the Courts Below

This is one of three separate but similar complaints filed by petitioners which were dismissed by the District Court and reviewed and affirmed by the Circuit Court in one opinion. The complaint against respondents Nastasi-White and Circle Industries was essentially for the same cause in the complaint filed against them by the union appointed trustees in a prior action in which the complaint was also dismissed for reasons affirmed by the Circuit Court in this action.[1] Petitioner thereafter added the nominal plaintiff Daniel Jones to the case and reinstated suit.

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1 Alfarone et al v. Nastasi-White, Inc. et al, 84 C 3181 - Append. pgs. 15b through 23b.

## STATEMENT OF FACTS

This suit stems from claims by the Union trustees of Local 1974 that contributions and liquidated damages are due to the annuity fund from the various employer defendants in these consolidated appeals. The employer trustees of the funds were joined as defendants because they did not join in bringing these suits. Specifically, plaintiffs claim that by not agreeing with the Union trustees that contributions to the funds were owing from defendant-employers and that a delinquency action should be commenced, the employer trustees breached their fiduciary duty under ERISA. Plaintiffs ask the Court to presume such a breach even though (a) there has been no decision by an arbitrator determining the deadlock on whether suit should be commenced, and no request by any of the

Union trustees that the deadlock be submitted to the arbitration process mandated by the provisions of the LMRA and the trust agreement establishing the funds , and (b) there was a prior decision of the District Court on exactly the same facts which determined that

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2 ARTICLE VII MEETING AND DECISIONS OF TRUSTEES

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Section 5. Majority Vote of Trustees. All action by the Trustees shall be by majority decision. Such majority vote shall govern not only this Article but any portion of this Agreement and Declaration of Trust which refers to action by the Trustees. In the event any matter presented for decision cannot be decided because of a tie vote, the matter shall remain in status quo pending arbitration as set forth in Article VIII hereof.

ARTICLE VIII ARBITRATION

Section 1. Application of this Article. In the event the Trustee cannot decide any matter or resolve any dispute because of a tie vote or in the event decisions cannot be made because of the lack of a quorum at two successive meetings of the Trustees, then

footnote continued on following page)

plaintiffs did not have standing to sue, and there was no basis for a claim for contributions. Alfarone v. Nastasi, supra.

In effect, this action represents a second attempt by the Union trustees to sue Employers Nastasi and Circle for

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footnote continued from preceding page)

and in either of such events the Trustees shall attempt to select an impartial arbitrator to hear and determine the matter, issue or dispute.

Section 2. Impartial Arbitrator. If the Trustees cannot agree on an impartial arbitrator within five days, the impartial arbitrator shall be selected from a list of arbitrators to be furnished by the senior judge of the United States District Court in the District in which the fund Office is located. Any Trustee may request such judge to furnish the list of arbitrators.

If the Trustees are unable to agree on an impartial arbitrator from the list submitted by the said judge within seventy-two hours after receipt of such list, the judge may be requested to designate an arbitrator qualified and competent by training and experience to decide the particular issue involved. The hearing shall be held within ten days after the Arbitrator has been selected.

purported delinquent contributions after the complaint in the prior action was dismissed. The only difference in the two actions is that now the Union trustees are joined by a putative participant in the funds to enable them to characterize it with respect to plaintiff, Jones, as a derivative or class action.

The complaint does not allege breach of fair representation of plaintiff, Jones, by Local 1974, nor does it claim the employer defendants hired non-union workers, nor does it claim that any work was done by Local 1974 members for which contributions to the fund were not made.

Concisely put, the complaint merely alleges the defendant-employers hired employees to perform work and that said defendant-employers did not employ members of Local 1974 but, rather, employed

members of another Union, Local 530, to perform work.

The allegations of the complaint must therefore be understood to mean that according to plaintiffs, defendant-contractors should have employed members of Local 1974 and paid contributions to their funds but, instead, employed members of Local 530 and made the contributions required by the appropriate collective bargaining agreement to their funds. In spite of that fact, plaintiffs contend that employer-defendants are obligated to make duplicate contributions as if Local 1974 members had been employed and performed the work. This is clearly a jurisdictional dispute and not a collection action.

By Memorandum and Order dated May 30, 1985, the District Court granted the motion of Nastasi and Circle to dismiss

the complaint in the earlier Alfarone action, based upon two grounds: First, that the Union trustees lacked standing to maintain an action against employers on behalf of the funds because the employer trustees had not agreed to bring suit and the arbitration procedures mandated by Section 302(c)(5) of the Taft Hartley Act, 29 U.S.C., Section 186(c)(5), and by the specific provisions of the trust agreements establishing the funds, had not been fulfilled. The Court also held that the trust agreements required plaintiffs to make a formal demand on the employer trustees and, after a deadlock, to seek the appointment of an arbitrator to resolve the deadlock. Secondly, the Court held that even if the Union had standing, the funds had no claim for contributions because defendants, Nastasi and Circle,

had not hired members of Local 1974 as employees to do the subject work and had paid them no wages.

Approximately two months after dismissal of the Alfarone action, this action was commenced, and it too was subsequently dismissed by the District Court on the grounds that plaintiffs lacked standing and, even if they had standing, they had no present claim for contributions for the reasons stated in the earlier Alfarone-Nastasi case.

In the consolidated appeal, the Court of Appeals affirmed unanimously.

## ARGUMENT IN OPPOSITION

Plaintiffs' petition is essentially a restatement of its arguments on the merits presented to the Court of Appeals.

This is not the routine collection case of employers who paid wages and withheld fringe benefits. Here, the work done was assigned pursuant to a Collective Bargaining Agreement with another union, and all wages and benefits were paid by the employer-defendants. Petitioner presumes (as if it were a matter already decided) that there are delinquent contributions and the employer trustees have refused to go out and collect them. That is clearly not this case.

### Petitioner Distorts the Holding of the Court Below

Plaintiffs contend the Court of Appeals' holding will render collection

of delinquency contributions more difficult and enable some trustees to block others from suing pending arbitration of a "spurious" issue between them and thereby immunize delinquent employer trustees from responsibility to pay or collect such contributions. That claim is the product of a creative, but erroneous, interpretation of the opinion of the Court below mixed with baseless factual presumptions, and out of context quotes from distinguishable cases in other circuits. Far from undercutting congressional intent, the holding of the Court of Appeals follows uniformly the letter and intent of Congress as expressed in the LMRA and ERISA.

The Court of Appeals held that where a dispute exists among trustees as to whether a suit should be brought, then the provisions of the LMRA and the terms

of the trust agreement must be followed to resolve the deadlock. The Court of Appeals did not hold, as petitioner implies, that arbitration is a condition precedent to bringing all actions for delinquent payments. In the instant case, Jones' action was started against the employer trustees after the District Court had already ruled in the earlier Alfarone-Nastasi case that there was no basis for any claim for contributions.

The Court of Appeals also did not hold that a refusal to bring suit could not be a breach of a fiduciary duty as petitioner implies. It ruled that a breach of fiduciary duty must be established before a derivative suit may be brought. A refusal to file a delinquency action is not in itself a breach of fiduciary duty when, as here, valid reasons exist not to do so. See Iron

Workers v. Bowen 695 F.2d 531, 536 (11th Cir., 1983). Self serving allegations do not a breach of fiduciary duty make, particularly in the light of the May 30, 1985 order in Alfarone-Nastasi that there was no valid claim for contributions. Because employer trustees disagree with their union counterparts and refuse to join in bringing what is tantamount to strike suits against employers, they are being charged with a breach of fiduciary duty. The charge is patently frivolous and suggests bad faith.

It is reckless for petitioner to suggest that the deadlock issue requiring arbitration is a "spurious" one. The wisdom of the employer trustees' position has been amply vindicated by the opinions of the District Court and the Court of Appeals that there is no

basis for a cause of action for unpaid contributions.

It is again reckless for petitioner to suggest the decision in this case has immunized delinquent employer trustees from responsibility. A fair reading of the opinion of the Court of Appeals does not reveal even a hint that a trustee who has acted improperly will be immune from redress according to law.

The Court of Appeals has reaffirmed Congress' intent that employers make contributions to such funds provided employees and employers are equally represented in the administration of the fund, together with such neutral persons as the representatives of the employers and the employees may agree upon, and in the absence of such neutral persons, the trust agreement must provide for arbitration in the case of

deadlock. Section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. Section 186(c)(5). The purpose of this equal representation requirement is to prevent misuse of funds by labor officials who would otherwise have sole control of money contributed by the employer. See United Mine Workers of America Health and Retirement Funds v. Robinson, 455 U.S. 562, 571-72 (1982); National Labor Relations Board v. Amax Coal Co., 453 U.S. 322, 330 n. 13 (1981); Rosenthal v. Ann Service Corp., 571 F.Supp. 1229, 1232 (S.D.N.Y., 1983).

Petitioner Contends the Provisions of ERISA and the Taft-Hartley Act Requiring Equal Representation and Arbitration of Deadlocks have been Repealed Without an Act of Congress

Petitioner strains the patience of the reader when it argues that "fiduciary" as used in Subdivision (g)(2) to Section 502 of ERISA, 29 U.S.C. Section

1132 (g)(2) means one person, and therefore, confers standing on one trustee to bring suit even though the trust agreement requires a majority vote and arbitration to resolve any deadlock. Petitioner has simply chosen to ignore the provisions of Section 402(a) of ERISA. Thus, when Section 502(e)(1) of ERISA and Section 306(g)(1) of MPPAA refer to the jurisdiction of federal courts to hear actions brought by a "fiduciary", those provisions must be read consistently with Section 402(a). To do otherwise is contrary to the well settled rule of construction that all parts of a statute, if possible, are to be given effect, and to the corollary that sections of a statute should be read consistent with one another. See American Textile Manufacturers Institute Inc. v. Donovan, 452 U.S. 490 (1981);

Helvering v. Credit Alliance Corp., 316 U.S. 105, 112 (1942). The named fiduciary provided for in the subject trust agreement are the trustees collectively.[3] Those trustees must exercise their powers jointly[4] and only by a majority vote (see footnote 2 supra). Neither the Taft-Hartley Act, ERISA, nor the trust agreements permit the trustees to act except by majority vote. If it were otherwise, the result of such individual

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3 ARTICLE I DEFINITIONS

Section 4. Trustees.

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(c) The term "Trustees" as used herein shall mean Employer Trustees and Union Trustees collectively, and shall include their successors when acting as Trustees.

4 ARTICLE III TRUSTEES

Section 1. Number. The operation and administration of the Insurance Fund shall be the joint responsibility of three trustees appointed by the Metropolitan New York Dry Wall Contractor Association, Inc. and three trustees appointed by the Union.

action would be the kind of chaos the union trustees have created in these cases. Incredibly, petitioner argues that the existing provisions of ERISA and the Taft-Hartley Act that require equal representation in the administration of the funds and the arbitration of a deadlock have somehow been repealed by implication.

Petitioner's Reference to Post Decisional Events

To excuse their failure, for nearly six years, to follow the simple arbitration procedure mandated by the trust agreement to resolve the deadlock, in a footnote at page 8 of the petition, plaintiffs purport to alert this Court to events occurring after the Court of Appeals' decision which are irrelevant and misleading and should therefore be

disregarded by the Court.[5]

The Holding of the Court of Appeals is in Harmony with Relevent Precedent

Petitioner relies on a litany of cases that are plainly not applicable to this case but are cosmetically attractive for their out of context language. Petitioner also uses selective language from relevant cases to distort their application to the instant case.

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5 Whatever plaintiffs' real motive, when it finally decided to seek arbitration, notwithstanding the simple expedited procedure for arbitration and the safeguard for selecting an impartial arbitrator, it chose to file an unauthorized demand for arbitration with the American Arbitration Association well knowing that the American Arbitration Association had no jurisdiction to hear this dispute and, in fact, declined to do so. The union trustees could simply have demanded the appointment of an arbitrator and if no agreement was reached in five days, petition the District Court to select the arbitrator (see footnote 2 supra.) Instead, plaintiffs steadfastly refuse to follow the plain language of the trust agreement knowing such conduct will surely perpetuate this needless and repetitive litigation.

The basis for petitioner's claim that the holding in the instant case is in conflict with decisions of the Third and Ninth Circuits, specifically Barrowclough v. Kidder, Peabody & Co., Inc., 752 F.2d 924 (3d Cir., 1985) and Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir., 1984), is at best baffling, if not wholly ingenuous.

In Barrowclough, the Third Circuit held the deferred compensation plan under consideration was specifically exempt from ERISA, that the plaintiff beneficiary was pursuing a personal statutory damage claim under 29 U.S.C. Section 1132(a), and that such a damage claim need not be resolved by arbitration, while claims arising under the plan itself continue to be subject to arbitration. It is clear that Barrowclough dealt with the ultimate

resolution of a beneficiary's personal damage claim. Our case deals with the manner of administering and controlling trust funds by fiduciaries, and the method of breaking deadlocks among fiduciaries as mandated by statute and the provisions of the trust agreement. Plaintiff Jones is not asserting a personal claim to enforce personal rights. See Thornton v. Evans, 692 F.2d 1064, 1079 n.35 (7th Cir. 1982). Barrowclough and the instant case cannot be in conflict because they deal with different subject matter and different issues.

Equally inapposite is Amaro. There the Ninth Circuit was faced with concurrent grievance claims under a collective bargaining agreement which had been submitted to arbitration and a personal statutory damage claim under Section 510 of ERISA. The Court found the personal

damage claim to be independent of collective bargaining rights, and the arbitration decisions did not therefore bar the Federal Court actions. Here too, the Court was not dealing with the rights and duties of fiduciaries in administering trust funds or the congressionally mandated method for joint control of the funds. Again, Amaro, unlike Jones, had a uniquely personal claim to enforce. Arbitration to resolve deadlocks among fiduciaries was not even before the Court. See O'Hare v. General Marine Transport Corp., 740 F.2d 160, 168 (2d Cir. 1984), cert. denied, 105 S.Ct. 1181 (1985). It is less than candid for petitioner to seriously argue that Amaro is in conflict with the holding in the instant case.

Likewise, Central States Pension Fund v. Central Transport, Inc., ____

U.S._____, 105 S.Ct. 2833 (1985), cited by petitioner. In Central States, the Court held that, under the facts of the case, an employer who participates in a multiemployer benefit plan governed by ERISA must allow the plan to conduct an audit involving the records of employees whom the employer denied were participants in the plan. In so holding, the Court noted and agreed with the argument of Central Transport that, in light of ERISA's standards, such an audit request would be illegitimate under the standard of loyalty if it were actually an effort by plan trustees to expand plan coverage beyond the class defined in the plans' terms or to acquire information about the employers to advance union goals. Also, the audit would be imprudent if it were clearly wasteful of plan assets or unrelated to legitimate plan concerns.

105 S.Ct. at 2840, n. 12. Nastasi and Circle suggest that the Court's observations about motive and intent are pertinent to the facts of this case.

Petitioner's reliance upon Nedd v. United Mine Workers, 556 F.2d 190 (3d Cir. 1977) is similarly misplaced. Nedd involved an action by beneficiaries of a fund against the fund trustees and the union for failure to enforce the obligations of employers to make contributions to the fund. The court held that the claim of tortious interference with a collective bargaining agreement by a fund trustee stated a non-frivolous cause of action under Section 301 of the Taft-Hartley Act. 556 F.2d at 198 n. 12. In so holding, the court specifically noted that it did not hold that all breaches of fiduciary duty may be redressed in an action under Section

301, but that sound public policy supported a federal common law cause of action for tortious interference by a pension fund trustee, in violation of his fiduciary duty to the pensioners. 556 F.2d at 198 n. 13.

Petitioner's references to Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984) are misleading in that there were four separate counts passed upon by the Court. Count one was dismissed for reasons not relevant here. Counts two and three were directed against employers for breaching the trust agreements by failing to pay the full amount of contributions and illegally diverting the surplus to their own use. The Court held that the employee-participants had no right of direct action against the employers under either ERISA or the

Taft-Hartley Act for deficient contributions to the trust fund or illegal receipt of the surplus. The court further held that the beneficiaries could not maintain a derivative action against the employers unless they first showed a fiduciary breach in the decision of the employer trustees to return the surplus and require a lower level of employer contributions. 723 F.2d at 336. In so holding, the Court emphasized the importance of protecting the trustees' authority to manage the assets and enforce the rights of the trust fund within the limits imposed by the trustees' fiduciary duties. As the Court stated:

> We recognize the complexity of many trust fund management decisions and the need to allow the trustees to make those decisions free from the second-guessing of less well-informed beneficiaries. The trustees are able, and indeed are obligated, to consider the collective interests of the fund and its beneficiaries, and their performance

> will only be handicapped if we allow individuals to file actions protecting narrower interests without first showing that the trustees have breached their fiduciary duties. 723 F.2d at 337.

Ruling on count four of the Struble complaint, the Court held that the dispute over application of the surplus and the alleged failure to collect the proper amount of employer contributions was properly submitted to an umpire, pursuant to Section 302 of the Taft-Hartley Act and the provisions of the trust agreement, and the Court rejected plaintiffs' claim that the employer trustees had breached their fiduciary duty by referring the dispute over the surplus to the umpire. This is clearly in harmony with the holding in the instant case.

Absent from plaintiff's petition, is any reference to Rosenthal v. Ann Service Corp., 571 F.Supp. 1229 (S.D.N.Y. 1983),

where the Court held upon facts very similar to those in the present case that the plaintiff lacked standing to sue. In Rosenthal, plaintiff, one of the trustees of four taxicab industry trust funds established pursuant to Section 302(c)(5) of the Taft-Hartley Act brought an action under Section 515 of ERISA against nineteen employers for, among other reasons, their alleged failure to make contributions to the funds of which plaintiff was a trustee. Plaintiff also alleged that he was a participant in the funds, as defined by Section 3(7) of ERISA, 29 U.S.C. Section 1002(7). The Court held that permitting plaintiff to bring the suit as trustee for the funds would violate both the Taft-Hartley Act and the relevant trust agreements. In analyzing the relevant

statutory provisions and the trust agreements themselves, the Court noted as follows:

> Exhibits and memorandas submitted by defendants and not challenged by plaintiff satisfy this Court that (the Funds) - administered by equal numbers of union and employer and employee trustees - meet the Taft-Hartley equal representation requirement.[7] (Footnote reproduced below).
>
> Plaintiff's desire to proceed as an individual trustee, without receiving the approval of his co-trustees or even formally presenting to them the grievances that underlie this action, contravenes the letter and spirit of Taft-Hartley and the trust agreements. Moreover, ERISA provides no support for such action. See ERISA Section 514(d), 29 U.S.C. Section 1144(d) (ERISA, with certain

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"7 ... We hold that where trust agreements carefully provide for a system of joint trusteeships, an individual trustee, absent clear language to the contrary, may not thwart the system of joint administration by proceeding as a fiduciary of the collecting agent trust....A contrary result would be unreasonable in light of the general scheme by which the Pension, Welfare, and Training funds are administered and, in addition, would render the benefit plan in violation of Taft-Hartley."

> exceptions, not to "alter, amend, modify, invalidate, impair or supersede any law of the United States"). Rosenthal, 571 F.Supp. at 1232.

The Court in Rosenthal also rejected plaintiff's contention that he had standing to sue as a "participant" under Section 502 of ERISA, 29 U.S.C. 1132. The Court noted that plaintiff was seeking to recover not benefits due to him or to enforce or clarify his rights, but rather was seeking to vindicate the rights of the fund. The Court stated further that the Taft-Hartley safeguard would be an ineffective tool if a trustee and participant in a fund could avoid the strictures on individual action imposed by Taft-Hartley Section 302 by suing in the guise of a "participant." Rosenthal, 571 F.Supp. at 1232.

In granting defendants' motion for summary judgment, the Court in Rosenthal

further noted that a contrary decision would lay the groundwork for law suits by any one trustee, at any time, to advance what is believed to be the best interest of the trust. That, the Court observed, would expose funding employers, the body of trustees, and the trust themselves to the risk of inconsistent obligations and other uncertainties - precisely the type of evil that Taft-Hartley, the trust agreements and ERISA itself aim to eliminate. Rosenthal, 571 F.Supp. at 1232-33.

## CONCLUSION

Unions should not be permitted to use ERISA through the union appointed trustees, to bring meritless litigation to further their own jurisdictional aims under threat of sanctions against employer trustees and suits against employers. That is precisely why joint control is required and arbitration is mandated by Taft-Hartley and the terms of the trust agreement to resolve deadlocks among fiduciaries.

The holding of the Court of Appeals in the instant case is clearly in harmony with the intent of Congress and with relevant precedent. Therefore, the

petition for a writ of certiorari

should be denied.

Dated: Garden City, New York
September 15, 1986

Respectfully submitted,

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